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ABSTRACT

This paper examines the current trends in local property tax assessment on institutions of higher education and extrapolates the possible effects these trends may have on colleges and universities in the future. It discusses the exemption from local property taxes that most higher education institutions traditionally have had, as well as recent efforts by localities to review these exemptions, especially in times of fiscal distress. The paper reviews specific cases in which local governments have challenged the tax exempt status of specific institutions. It then examines specific strategies that local governments have used to challenge the tax exempt status of specific properties owned by colleges and universities, including properties used for residential purposes, leased facilities, and properties used for noneducational purposes. The paper also reviews cases in which local authorities have requested payments in lieu of taxes. Two appendixes provide summaries of selected cases. A total of 31 cases are cited. (Contains 30 references.) (MDM)

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Higher Education Institutions and Property Taxation: The Hidden Costs of Local Community Financial Stress

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Williamsburg, Virginia
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Higher Education Institutions and Property Taxation:
The Hidden Costs of Local Community Financial Stress

The *ad valorem* property tax exemption, currently enjoyed by both public and private institutions of higher education, is increasingly being called into question by local community leaders seeking new sources of revenue to sustain established public services. While once considered untouchable, an increase in public resentment over perceived taxation inequities and a decrease in civic revenues are causing local officials to scrutinize the property tax exemption as one tactic in solving their financial woes. A repeal of the property tax exemption, or even a stricter interpretation of current tax statutes by state legislatures, however, could have harmful effects on the financial exigency of colleges and universities already experiencing fiscal difficulties (Ginsberg, 1980; Keeling, 1990; Rudnick, 1993).

By evaluating recent case law and legislative decisions, this paper examines the current trends in local property tax assessment on institutions of higher education, and extrapolates the possible effects these trends may have on colleges and universities. The consequences of current property tax assessment trends, however, are difficult to extrapolate because real estate tax laws are determined by state, rather than federal, legislatures. Since property taxes are collected to support the services provided by local governments (Rudnick, 1993), the laws governing real estate tax assessment are resolved at the state level. Consequently, property tax laws of each state must be evaluated the to obtain an understanding of current nation trends in property tax assessment on institutions of higher education..

Background Information

State legislatures traditionally grant a real estate tax exemption to an institution that: (a) is organized as a nonprofit institution for an exempt purpose, with none of its income benefiting private constituencies, (b) devotes its assets to furthering its exempt purpose; (c) uses the property for a privileged purpose; and (d) operates activities that benefit an indefinite non-exclusive class (Bookman, 1992; Ginsberg, 1980; Oleck, 1974; Wellford & Gallagher, 1988). The authorization for state legislatures to provide a property tax exemption to 501(c)(3) organizations, including colleges and universities, is found in a state's constitution. Constitutional provisions either provide the exemption themselves, or grant the legislature power to adopt additional legal statutes granting tax exempt status. Thirty six state constitutions provide a property tax exemption, or allow state legislatures to add statutes granting immunity, for nonprofit organizations. In the remaining states, constitutional provisions are more broad and permit the legislature to grant a tax exemption to any institution, including educational and charitable entities (Bookman, 1992; Ginsberg, 1980; Wellford & Gallagher, 1988).

The effectiveness of property tax exemption laws, however, depends on whether the real estate tax exemption provisions are found in a state's constitution or its legislative statutes. In Kentucky, for example, state and local community leaders are constitutionally prohibited from taxing any property owned by nonprofit organizations, including colleges and universities. Local leaders, therefore, cannot challenge the exempt status of university property without first amending the state constitution. In other states, such as Virginia,

where the provisions granting an exemption are found in statutes adopted by state legislatures, an institution's tax exempt status can more easily be disputed. Community leaders, displeased with property tax exemption statutes, can question the constitutionality of these laws by initiating judicial proceedings (Keeling, 1990).

Property Tax Exemption and Local Fiscal Distress

Local community leaders are increasingly challenging the *ad valorem* property tax exemption because a growing number of cities in the United States are experiencing fiscal distress (Gelfand & Salsich, 1985; Pagano & Moore, 1985). In 1988, 50% of American cities encountered budget deficits and were unable to obtain the financial assets necessary to meet spending needs (Bookman, 1992). This lack of adequate resources is attributed to a number of factors including: (a) reductions in federal government grants to cities (Bookman, 1992; Grobman, 1994); (b) increases in state and federal mandates to provide services without supplying additional funding (Bookman, 1992; Grobman, 1994); (c) the recession and the resultant increase in demand for municipal services (Grobman, 1994); (d) the flight of the middle class to the suburbs leaving the poor and elderly, with limited incomes, in the central cities (Grobman, 1994; Pagano & Moore, 1985); (e) the unwillingness of property owners to absorb additional tax increases (Grobman, 1994); (f) a shift in the economic base from higher wage manufacturing jobs to lower wage service related employment (Blumenstyk, 1988; Leland, 1994); (g) higher costs for education, health care, and law enforcement at local level (Mercer, 1994); and, (h) increases in amount of tax exempt property within municipal borders (Becker, 1969; Grobman, 1994;

Mullen, 1990). Officials in cities that are losing their tax base and experiencing decreasing revenues, regardless of the reason, are searching for new sources of income to continue funding programs and services at current levels (Bookman, 1992; Ginsberg, 1980). Consequently, local leaders, particularly in municipalities with large portions of property owned by exempt organizations, scrutinize the state authorized real estate tax exemption as one tactic in solving their financial woes (Bookman, 1992; Oleck, 1974; Pagano & Moore, 1985).

Colleges and universities are of great interest to tax officials disputing the property tax exemption for a variety of reasons (Bookman, 1992). Colleges own large amounts of property that can provide a city with a significant source of revenue if their tax exempt status is overturned. Economic impact studies have calculated the amount of property tax revenues some locales lose from land owned by colleges and universities within their taxing jurisdictions. For example: (a) St. Cloud, Minnesota loses $400,000 annually from exempt property held by St. Cloud University (Lange, 1980); (b) revenues in Monmouth, New Jersey are reduced by $370,000 a year due to the tax exempt status of Georgian Court College (Barry, 1987); (c) Akron, Ohio would receive $4 million annually from the University of Akron in property tax revenue if the institution was not tax exempt (Simmons, 1992); and (d) the property tax revenue of the City of Lynchburg is reduced $295,000 a year as a result of the Liberty University's real estate tax exemption (The Economic Impact of Liberty University, 1990).

Community leaders also challenge the tax exempt status of colleges and universities because they believe that institutions of higher education have large budgets

and endowments and can afford to pay for the services that cities provide. Bookman (1992) states that the "caricature that has emerged of higher education is one of an industry that, having been put through the ringer in the 1970's, recovered in the early 1980's, and then began to grow rich and greedy as the decade wore on" (p. 6). Consequently, "tax assessors with an eye out for the public dollar look yearningly at multi-million dollar university complexes," (Alexander and Solomon, 1972, p. 211) as a primary source of additional property tax revenue.

Local government officials, however, can, ordinarily, only challenge the tax exempt status of real estate utilized by private institutions of higher education. Property owned and operated by public colleges and universities is immune from property taxation, and cannot be scrutinized by city leaders, due to the doctrine of sovereign immunity[1]. Under the doctrine of sovereign immunity, property owned by federal, state, and local governments is "not subject to taxation because of its use by the sovereign for governmental purposes. It embodies the general principle that the sovereign cannot sensibly be thought to intend to tax its own property, since it would then have to levy a second tax to pay the first one." (Ginsberg, 1980, p. 299). The government would merely be moving funds from one account to another without a net gain in actual tax revenue (Ginsberg, 1980).

In an effort to justify their challenge to the property tax exemption, local officials shift their focus from the benefits that an university brings to a community to the burdens

[1] Property owned by the federal, state, or local government and leased to forprofit organizations for commercial use, however, is not subject to immunity from property taxation and may be taxable.

the institution places on the city treasury instead. The primary reason state law provides a property tax exemption is to encourage the existence of nonprofit organizations in the private sector because of the benefits they provide to society. These benefits include: (a) serving a public good (Keeling, 1990), (b) relieving the government of a fiscal burden (Keeling, 1990); (c) providing indirect financial benefits, such as jobs and direct goods and services, to local community members (Alexander & Solomon, 1972; Ginsberg, 1980); and, (d) increasing the tax contributions of other property owners by economically supporting nearby businesses, and enhancing the value of other property in the area surrounding the exempt land (Alexander & Solomon, 1972; Ginsberg, 1980). Community leaders focusing on these benefits believe that a college provides more benefits to a community than it costs the municipality to host and service the higher education institution (Bookman, 1992).

Community leaders more concerned with the burdens that an institution places on the city treasury, however, perceive that the costs to host an university are greater than the benefits the taxing district receives from the entity in return. Institutions of higher education, like other property owners, require a significant amount of government services such as police and fire protection, road maintenance, and snow removal (Bookman, 1992; Ginsberg, 1980). Unlike other property owners, however, who compensate the community for these services through property tax payments, colleges and universities obtain the same assistance without remunerating the municipality in an equitable manner; thus, creating the perception that they are not paying their fair share (Ginsberg, 1980; Greenwood, 1981; Oleck, 1974).

Property Tax Exemption and Case Law

Municipal leaders initiate a property tax exemption dispute with a college or university by overturning the tax exemption on the property in question and presenting college administrators with a tax invoice. Campus officials, involved in a tax exemption challenge, can either accept the tax exemption denial and pay the property tax, or uphold the institution's right to the tax exemption and refuse to remunerate the city for the amount of tax owed. When university administrators uphold their right to the property tax exemption, a judicial battle usually results, and a state's court system has the responsibility of determining the exempt status of the institution's property through interpreting state tax laws (Oleck & Stewart, 1994).

In interpreting tax statutes, state court systems[2] have resolved a number of legal issues surrounding the property tax exemption controversy. First, state courts throughout the United States have affirmed that state legislatures do have the power to exempt property from taxation through constitutional (Independent School District No. 9 of Tulsa County v. Glass, 639 P.2d 1233 [Okl. 1982]) and legislative provisions (Alpha Rho Zeta of Lambda Chi Alpha, Inc. v. Inhabitants of City of Waterville, 477 A.2d 1131 [Me. 1984]). At the same time, however, magistrates have also determined that being exempt from federal income taxation as a nonprofit entity, does not mandate that the institution must be exempt from property taxation as well (Council Rock School District v. G.D.L. Plaza Corp., 496 A.2d 1298 [Pa. Comwlth. 1985]). A property tax exemption, therefore,

[2] Since real estate taxation laws are determined by state, rather than federal legislatures, all property tax litigation is conducted in state courts since federal laws are not being challenged.

is a "matter of legislative grace, not a right" (Jonesville Community Day Care Center, Inc. v. Spoden, 376 N.W.2d 78 [Wis. App. 1985], p. 79), and not something to take for granted.

Second, state courts have concluded that an exemption from local property taxation is granted by the municipality's tax assessor, rather than local government officials (Connolly v. County of Orange, 824 P.2d 663 [Cal. 1992]). The exempt status of property is never secure, however, because an exemption granted by a previous assessor is not necessarily binding on future tax officials (Faculty - Student Ass'n of State University College at Buffalo v. Town of Lyndon, 523 N.Y.S.2d 943 [N.Y.Sup. 1987]). In the past, property tax cases were litigated only when a tax assessor repealed an institution's tax exempt status and university leaders refused to accept the tax assessors ruling (Ginsberg, 1980). More recently, however, when a tax assessor has upheld the exempt status of an institution, local government officials, desiring to have an institution's property tax repealed, have initiated judicial proceedings against the tax assessor in an attempt to have the exemption ruling overturned (In re Appeal of City of Washington, No. 93-7033 (C.P. Washington County 1994), rev'd, No. 2052 C.D. 1994 [Pa. Commonwealth Ct. 1995]).

Third, in defining state property tax laws, the courts have held that a taxpayers "exclusive remedy to redress a wrongful denial of a tax exemption is to commence a tax certiori proceeding" (Long Island University v. Board of Assessors, 481 N.Y.S.2d 400 [N.Y.A.D. 2 Dept. 1985], p. 401). University leaders challenging the denial of its exempt status, however, have the burden of proof in property tax determinations (Faculty - Student Ass'n of State University College at Buffalo v. Town of Lyndon, 523 N.Y.S.2d

943 [N.Y.Sup. 1987]). Consequently, institutional officials claiming the exemption must clearly prove that the property in question is entitled to an exemption under the state's tax laws (In re Maier, 319 S.E.2d 410 [W.Va. 1984], City of Hoboken v. Trustees of Stevens Institute, 588 A.2d 247 [N.J. Tax 1990], Oleck & Stewart, 1994).

Fourth, judicial officials have purported that since taxation is considered the rule, and exemption from taxation the exception (Adult Student Housing, Inc. v. State Dept. of Revenue, 705 P.2d 793 [Wash. App. 1985]), tax statutes are to be strictly construed against the granting of an exemption (University of Hartford v. City of Hartford, 477 A.2d 1023 [Conn. App. 1984]) or fairly construed within legislative intent (Trustees of Indiana University v. Town of Rhine, 488 N.W.2d 128 [Wis. App. 1992]). Tax exempt statutes were originally construed most strongly against the taxing authority, with any doubts concerning exempt status being resolved in favor of the taxpayer. Consequently, when statutes were open to more than one interpretation, disposition most favorable to the taxpayer was given. As the number of property tax exemption cases increased, however, the opposite rule developed, with any ambiguities in the tax provisions being most strongly construed against the taxpayer instead (Hellerstein & Hellerstein, 1978; Oleck & Stewart, 1994).

Fifth, in interpreting tax laws, state court systems have upheld the real estate tax exemption on property as long as the actual use of the property falls within the wording or meaning of the state's constitutional and statutorial provisions (Alexander & Solomon, 1972). The property tax statutes is all states are worded in such a way that they fall into

three broad categories. Most states[3] have real estate tax exemption provisions that declare that, to be exempt,[4] property must be used exclusively for an exempt purpose. The tax laws in other states, however, only require that the property be used primarily for an immune purpose to remain tax free. Finally, the language of the property tax statutes in a few states[5] permit exempt land to be used substantially for nonexempt purposes as long as real estate taxes are paid on the portion of the land not utilized in pursuit of an organization's exempt goals (Bookman, 1992, Ginsberg, 1980; Hill & Kirschten, 1994; Keeling, 1990).

State courts, however, have rarely interpreted tax statutes, particularly those requiring that property be used exclusively for an exempt purpose, to mean exactly what they purport (Ginsberg, 1980). If a traditional definition of "exclusive" were utilized, any use of real estate for a nonexempt purpose, regardless of how small, would destroy the tax exempt status of the entire property. Consequently, the magistrates in most states have defined "exclusive" as "primary" so that, as long as the principal use of the property is for an exempt purpose, any incidental use for a nonexempt purpose will not endanger an institution's tax exemption (Ginsberg, 1980; Keeling, 1990). In addition, in situations where a substantial amount of property is used for a nonexempt purpose, the courts continue to grant the exemption for those portions of land used for the exempt purpose, but require institutions to pay taxes on the nonexempt areas (Hill & Kirschten, 1994; Oleck, 1974).

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[3] For example, Connecticut, Colorado, Maine, and Oklahoma.
[4] Arizona, Delaware, Georgia, Missouri, and Indiana.
[5] Washington, Wyoming, New Jersey, and Florida.

Finally, judicial systems have concluded that property is utilized for an exempt purpose if it furthers the goals for which an organization was granted its exempt status. An institution's exempt purpose is determined by examining its bylaws and charter (Evangelical Teacher Training Ass'n v. Novak, 454 N.E.2d 836 [Ill. App. 2 Dist. 1983]). Consequently, real estate used by an exempt organization for an exempt purpose not related to its mission, may not be immune from property taxation (Hill & Kirschten, 1994) under the state's tax laws.

Current Trends in Property Tax Assessment

Since state magistrates have upheld the property tax exemption on real estate used by an organization to further its exempt purpose, local tax assessors rarely challenge the exempt status of university property utilized for traditional educational activities. They employ alternate strategies to overturn a college's property tax exemption, and collect real estate tax payments, instead. A review of recent case law and legislative actions, arising from property tax exemption challenges throughout the United States, reveals that local leaders are exacting property tax payments from institutions of higher education utilizing four distinct strategies.

Challenges to Property Used for Noneducational Purposes

The first strategy local tax assessors use to collect property tax payments from colleges and universities is to challenge the tax exempt status of real estate used by institutions of higher education for nontraditional educational purposes. Local leaders typically view university property utilized for noninstructional or auxiliary purposes, that

support the institution's mission or enhance the college experience of students, as servicing a nontraditional educational function, and not qualifying for the property tax exemption. Consequently, the real estate tax exemption on property used for residence halls, dining halls, parking lots, recreational facilities, stadiums, day care centers, administrator and faculty housing, and future expansion is often disputed and resolved through the judicial process (Ginsberg, 1980; Kelling, 1990; Wellford & Gallagher, 1988).

Municipal leaders first challenged the property tax exemption on real estate used for noninstructional purposes prior to the twentieth century. These early property tax cases were primarily concerned with determining the exempt status of real estate used by colleges for residential purposes, and yielded conflicting results. In President and Trustees of Williams College v. Assessors of Williamstown, 46 N.E. 394 (Mass. 1897), the court held that houses owned by the college and rented to professors were not used by the college for institutional purposes and, therefore, not exempt from property taxation. The judge declared that, "the occupants were each in the sole occupation of the premises...for strictly private purposes with control in them, not the college" (Alexander & Solomon, 1972, p. 218). In a similar challenge (Harvard College v. Assessors of Cambridge, 55 N.E. 8449 [Mass. 1900]), the magistrate reached a different conclusion and upheld the property tax exemption on real estate utilized for residential purposes. Property used for housing by the college's faculty and president, as well as for private eating clubs, was found to be exempt, and used in furthering the institution's mission, since the college did not receive rent or compensation from those utilizing the facilities (Alexander & Solomon, 1972; Brubaker, 1971).

Two other early cases, involving student residence halls, also yielded contradictory outcomes. In Yale University v. Town of New Haven, 42 A. 87 (Conn. 1899), property used to house students was found to be exempt even though students paid to reside in the facility. A property tax exemption was denied, however, in Phillips Exeter Academy v. Exeter, 58 N.H. 306 (1878), when part of the facilities used for dormitories was also used for commercial purposes not related to the institution's educational mission (Alexander & Solomon, 1972).

These early property tax exemption cases demonstrate the complexities involved in challenging the exempt status of property utilized by educational institutions for noninstructional or auxiliary purposes. The courts in each state have defined "traditional educational use" in different manners (Ginsberg, 1980; Keeling, 1990). Consequently, property utilized for noninstructional purposes continue to be exempt or not exempt from property taxation based upon the extent to which the use of the disputed property is found to further the institution's traditional educational purpose in accordance with the court's interpretation of tax statutes (see Appendix A for a list of selected cases).

To illustrate, three similar cases involving the exempt status of college property used for residential purpose, in different states, yielded three distinct rulings. The Pennsylvania appellate court, in In re Swarthmore College (645 A.2d 470 [Pa. Cmwlth. 1994), upheld the property tax exemption on university real estate used to house a college administrator. The exemption was granted because the residence was partially used to entertain college representatives and donors, an activity directly related to the college's educational function, according to state law. Tennessee law, however, states that only

property "used purely and exclusively for carrying out one or more purposes for which the institution was created or exists" (Tusculum College v. State Board of Equalization, 600 S.W.2d 739 [Tenn. App. 1980], p. 739), is tax exempt. Consequently, only a partial real estate tax exemption was granted to an university owned residence that was used in a similar manner. The state court denied the tax exemption for those portions of the facility employed entirely for residential purposes (Tusculum College v. State Board of Equalization, 600 S.W.2d 739 [Tenn. App. 1980], p. 739). A Texas appeals court, however, in Bexar Appraisal District v. Incarnate Word College (824 S.W.2d 295 [Tex.App.-San Antonio 1992]) came to a completely different conclusion. The magistrate denied the real estate tax exemption for a college president's residence because Texas law does not consider entertaining an educational activity. Consequently, tax assessors, in states where the real estate tax exemption on noninstructional uses of property can be disputed, will continue to challenge the tax status of university property utilized for auxiliary purposes.

Challenge to Leased Property

A similar tactic local tax assessors use to exact property taxes from colleges and universities is to overturn the tax exempt status of portions of university real estate leased to forprofit corporations for commercial and educational purposes. Although public institutions of higher education are usually immune from property tax challenges under the doctrine of sovereign immunity, tax officials can challenge the exempt status of property state universities lease to forprofit entities because "immunity from local taxation does not

extend to federal or state property leased to a private organization and used for the lessee's commercial purposes" (Ginsberg, 1980, p. 300).

State court systems have traditionally upheld the tax exempt status of university property leased to a forprofit firm if it is used, by the corporation, for activities related to the college's mission (Blair Academy v. Blairsstone, 232 A.2d 178 [N.J. Sup. Ct. 1967]). In addition, the tax exemption is usually denied when the real estate leased to the private firm is used for noneducational related activities that do not support the institution's exempt purpose (Johnson v. Department of Revenue, 639 P.2d 128 [Or. 1982]); Segroves v. Supervisor of Assessments for Haford County, 444 A.2d 1051 [Md. App. 1982]). In a relatively recent court decision (Stevens v. Rosewell, 523 N.E.2d 1098 [Ill. App. 1 Dist. 1988]), however, the magistrate repealed the tax exempt status of property used by a restaurant franchise to "provide, operate, and maintain food service facilities on the campus . . ." (p. 1099) in support of the institution's educational purpose. The issue in this case was whether the franchise was operating under a lease or license agreement with the college (Hill & Kirschten, 1994; Keeling, 1990). The court of appeals held that the

> food service agreement . . . was a lease agreement, rather than a license agreement, so that the franchise restaurant operated on college campus was not exempt from real estate taxation as property belonging to community college; although agreement stated it was a license and service agreement, agreement provided for fixed term and fixed rental, limited location of food operation to fixed location, and did not provide college with control over restaurant's operations. (p.1099)

This decision was a departure from rulings, in earlier cases challenging the use of commercial organizations in food service operations, which upheld the property tax exemption on the portions of real estate used by the private entities. In Pace College v. Boyland, 151 N.E.2d 900 (N.Y. 1958), the court held that the college cafeteria was exempt from property taxation regardless of whether the college operated the cafeteria itself or utilized an outside agency (Alexander & Solomon, 1972). Blair Academy v. Blairrstone, 232 A.2d 178 (N.J. Sup. Ct. 1967) yielded similar results; the court determined that, although the food service operation was contracted out, its primary purpose was to service the school, supporting the institution's educational mission (Bookman, 1992).

The primary difference between these property tax exemption challenges and Stevens v. Rosewell, 523 N.E.2d 1098 (Ill. App. 1 Dist. 1988) is that administrators, in the earlier cases, maintained direct supervision over the operations of the private organizations. In Pace College v. Boyland, 151 N.E.2d 900 (1958), the court held that it made no difference whether the cafeteria operation was carried out by individuals employed directly by the college or the independent contractor since the college retained general supervision over the college's food service procedures (Alexander & Solomon, 1972). In Stevens v. Rosewell, 523 N.E.2d 1098 (Ill. App. 1 Dist. 1988), the court concluded that, because community college officials gave the franchise operator complete control over the campus space it occupied, they did not supervise the franchise's operations; thus, the college's property was subject to real estate taxation.

Other court decisions, resulting from challenges to the exempt status of leased property, focus on the amount of revenue institutions of higher education receive from property leased to forprofit corporations. State courts traditionally uphold the tax exemption on leased property that provides only incidental income to a college or university. In addition, magistrates ordinarily overturn the property tax exemption for property that provides a university with substantial revenue, and hold that leased real estate is used primarily for enhancing revenue rather than for furthering an educational purpose (Keeling, 1990). Exceptions, however, are found in two Ohio cases (Board of Trustees of Ohio State University v. Kinney, 449 N.E.2d 1282 (Ohio 1983); State for Use of University of Cincinnati v. Limbach, 553 N.E.2d 1056 [Ohio 1990]), where property owned by state universities, but leased to entities not related to the institutions, was found to be exempt because the profits were used to support the general operating budgets of the institutions. The courts upheld the property tax exemption on the leased real estate because the profits lessened the amount of state funds needed to support campus operations (Bookman, 1992).

The responsibility for paying the taxes resulting from a lease agreement varies by state. In some states (Illinois and Maryland for example) the leasing organization is responsible for the taxes as if it were the property owner. In Stevens v. Rosewell, 523 N.E.2d 1098 (Ill. App. 1 Dist. 1988), consequently, the franchise operator was responsible for remunerating the property tax liability. In other states (Alabama, Tennessee, and Texas), the lessor is responsible for paying the property tax, despite any arrangements in the lease transferring responsibility for the tax payment to the leasing organization

(Keeling, 1990). In University of Hartford v. City of Hartford, 477 A.2d 1023 (Conn. App. 1984) the court held that property tax owed on the leased property was to be assessed against the lessor, as the property owner, who by statute was obligated to pay the tax even though the lessee agreed to pay the tax liability.

With institutions of higher education increasingly seeking to reduce expenditures, or augment revenues, by privatizing the operations of auxiliary support services, through contract and lease agreements with private organizations (Hackett, 1992), the trend to tax institutional property leased to other organizations for any purpose is a cause for concern. If challenges to the tax exempt status of leased property subjects private forprofit organizations to real estate taxes, on the portions of exempt property on which they operate, their ability to provide services more efficiently and effectively than the institutions' themselves could be greatly reduced. The cost of privatization to colleges and universities could also increase if institutions of higher education were required to requite the real estate tax instead. With little litigation to guide college and university leaders at this time, this issue deserves careful consideration as institutions of higher education continue their privatization endeavors.

Challenge to an Institution's Exempt Status

Another strategy tax officials use to assess property taxes on institutions of higher education is to repeal an institution's tax exempt status by determining that the college or university is not organized for an exempt purpose. Tax assessors, in a limited number of states, are increasingly challenging the tax exempt status of all real estate owned by

nonprofit organizations, including colleges and universities, on the basis that they are not providing sufficient "charitable" service, and, therefore, not furthering an exempt goal (Bookman, 1992). While the tax statutes in some states specifically grant a property tax exemption to institutions organized for an education purpose, laws in other states limit the exemption to organizations that serve a charitable function instead. When states restrict the real estate tax exemption to charitable organizations, college and universities must meet the state's definition of "charitable" to obtain a real estate tax exemption (Hill & Kirschten, 1994).

Court systems throughout the United States have developed tests to determine if an institution is organized for a charitable purpose in property tax exemption challenges. Typically, charitable purpose tests examine if an organization: (a) benefits the community or public in general; (b) relieves a government burden; (c) serves a charitable class (i.e., poor, disadvantaged, sick or infirmed, elderly, young people, etc.); (d) charges recipients for its services; (e) receives support from donations and gifts; and (f) operated in a manner that differs from that of commercial competitors (Wellford & Gallagher, 1988). State magistrates vary, however, in how they apply the tests in determining if an organization is immune from property taxation. In some states, even when a number of factors must be considered, the presence or absence of a single criteria will not effect an organizations exempt status (Bookman, 1992; Wellford & Gallagher, 1988). Consequently, institutions of higher education easily qualify as charitable organizations, limiting a tax assessor's ability to challenge their property tax exemption.

In other states, such as Pennsylvania, all nonprofit institutions, including colleges and universities (Trustees of the University of Pennsylvania v. Board of Revision, 649 A.2d 154 [Pa. Comwlth. 1994]), must meet a specific set of criteria to considered charitable and tax exempt (Bookman, 1992).[6] To classify as a charitable organization in Pennsylvania, and exempt from property taxation, private and state related institutions of higher education must meet all five criteria of the charitable purpose test developed in Hospital Utilization Project v. Commonwealth, 487 A.2d 1306 (Pa. 1985). A college or university must: (a) advance a charitable purpose; (b) donate or gratuitously render a substantial portion of its services; (c) benefit a substantial and indefinite class if persons who are legitimate subjects of charity; (d) relieve the government of some of its burden; and (e) operate entirely free from private motive (Hill & Kirschten, 1994; Grobman, 1994; Leland, 1994).

The first institution of higher education to lose its tax exempt status under Pennsylvania's charitable purpose test was Washington and Jefferson College.[7] Washington and Jefferson College's property tax challenge began, in 1993, when City of Washington officials disagreed with a tax assessor's ruling upholding the institution's tax exempt status. City officials appealed the tax board's determination to the trial court asserting that the college was not "a purely public charity and that its exempt status violated the applicable statutes and judicial decisions" (In re Appeal of City of Washington, No. 93-7033 [C.P. Washington County 1994], p.2). In 1994, the

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[6] Also Idaho, Illinois, Minnesota, Oregon, and Utah.

[7] Washington and Jefferson College's tax exempt status was reinstated in September, 1995, when the Commonwealth Court of Pennsylvania reversed the lower courts ruling. An appeal to the state supreme court, however, is expected (Healy, 1995)

Pennsylvania Court of Common Pleas sustained the city officials' appeal, and repealed the college's property tax exemption on the basis that the institution only met one of the criteria of the charitable purpose test--it operated free from a private motive. The lower court magistrate concluded that the college has "grown into an enterprise of big business" (p. 20), and that

> The economic realities of today do not promote a nostrum. More and more, municipalities face financial crisis in part because properties are taken off the tax rolls and placed on exempt status. All the same, they must furnish fire protection, police protection, road maintenance, snow removal, and myriad other services to the public as well as to charitable institutions. Placing properties on the shelves of exemption obtrudes upon the orderly fiscal processes which are required for the stability of local governments. Unless an institution can clearly show that it qualifies for exemption, it must pay its fair share of taxes. (In re Appeal of City of Washington, No. 93-7033 [C.P. Washington County 1994] p. 22)

In September, 1995, however, the Commonwealth Court of Pennsylvania reversed the lower court's decision, and reinstated Washington and Jefferson College's tax exempt status (In re Appeal of City of Washington, No. 2052 C.D. 1994 [Pa. Commonwealth Ct. 1995]). The appeals court concluded that Washington and Jefferson College does qualify as a purely public charity under the Pennsylvania Constitution, and the criteria presented in Hospital Utilization Project v. Commonwealth, 487 A.2d 1306 (Pa. 1985), and is entitled to the property tax exemption (see Appendix B for a comparison of the lower and appellate court rulings). City of Washington officials plan to appeal the Commonwealth

Court's decision to the state supreme court in a final attempt to overturn Washington and Jefferson College's tax exempt status(Healy, 1995b). The Pennsylvania Supreme Court, however, may never hear the case because Pennsylvania legislatures have introduced legislation to amend the state's property tax statutes to ensure that college and university owned real estate remains tax exempt (Grobman, 1994; Leland, 1994). If this enactment passes, tax assessors in Pennsylvania will no longer be able to utilize the state's charitable purpose test when challenging the tax exempt status of higher education institutions.

Tax assessors in other states have not yet utilized common law charitable purpose tests in college and university property tax exemption challenges. The continued propensity of courts to apply a stricter definition of exempt purpose in real estate tax exemption cases involving other types of nonprofit organizations, however, could induce tax officials to utilize this strategy more readily in the future. Consequently, this trend in real estate tax assessment bears watching since a stricter definition of exempt purpose, on a wider scale, could have serious financial repercussions on colleges and universities, particularly those already experiencing fiscal difficulties.

Payments in Lieu of Taxes

A final tactic city officials employ, to assess property tax payments from institutions of higher education, is not to challenge the tax exempt status of university real estate, but to request payments in lieu of taxes instead. Municipal leaders throughout the United States are seeking to relieve fiscal burdens by asking private and public college administrators to make voluntary monetary or service contributions to help offset the cost

of local assistance ("Alternatives to the University Property Tax Exemption", 1973; Bookman, 1992; Hill & Kirschten, 1994).

Local officials, in states where tax assessors are constitutionally or legislatively prohibited from challenging an institution's property tax exemption, view payments in lieu of taxes as an easy method of increasing revenues and solving their financial woes (Rudnick, 1993). Consequently, a fair proportion of colleges and universities, in states which restrict tax officials from assessing property tax payments, have agreed to make voluntary payments to their local communities. Yale administrators, in 1990, agreed to remunerate the city of New Haven $4.2 million annually, and place the institution's golf course on the tax rolls, as a means of compensating the city for lost property tax revenue (Hill & Kirschten, 1994). Other institutions making annual contributions to city treasuries include: (a) Dartmouth--$1 million; (b) Harvard--$970,000; (c) Massachusetts Institute of Technology--$900,000; (d) University of California, Berkeley--$200,000; and, (e) Princeton--$35,000 (Bookman, 1992; Blumenstyk, 1988; Stepneski, 1993).

Community leaders, in states that allow property tax exemption challenges, are also exercising this strategy to assess payments from colleges and universities (Grobman, 1994; Leland, 1994). Many officials give institutional leaders the choice of either making voluntary contributions or having their tax exempt status challenged through litigation ("Alternatives to the University Property Tax Exemption", 1973). Municipal leaders throughout the state of Pennsylvania, where institutions of higher education must meet the state's charitable purpose test to remain tax exempt, have requested payments in lieu of taxes from colleges and universities in exchange for not contesting the institutions' tax

exempt status (Grobman, 1994). King's College and the University of Scranton, consequently, agreed to voluntarily contribute $40,000 and $50,000 annually to their local communities rather than risk losing their real estate tax exemptions (Bookman, 1992; Mercer, 1994). In addition, although local tax assessment boards upheld their tax exempt status, Ursinius College and Elizabethtown College also agreed to make payments to local treasuries to stave off future appeals (Healy, 1995a).

In 1994, the mayor of Philadelphia issued an executive order (No. 1-94, As Amended [1995]) requesting that all tax exempt organizations, including 25 colleges and universities, make voluntary payments in lieu of taxes equal to 40% of their property tax liability (Grobman, 1994; Healy, 1995a). The ordered stated that

> nonprofit, non-governmental institutions in the City should contribute their fair share for the municipal services and benefits they receive. All institutions currently afforded tax exempt status . . . should forfeit their tax exemptions. In lieu of such forfeiture, and in settlement of any potential legal challenge to its exemption, a currently tax exempt institution whose exemption status is legally unclear may instead remit to the City voluntary contributions, a portion of which may be in the form of services. . . . In the event the Board is unable to enter into a Voluntary Contribution Agreement . . . the Board shall refer the matter . . . with a recommendation to institute a challenge to the institution's tax exemption. (Exec. Order No. 1-94, As Amended [1995], pp. 1-3)

As of May, 1995, all institutions of higher education in Philadelphia had entered into agreements to provide monetary and service contributions to the city rather than risk a tax exempt challenge (Healy, 1995a)[8].

Several problems are associated with payment in lieu of tax agreements. City officials must reach agreements with each organization on an individual basis, a costly procedure, in time and resources, for both city and university officials. Second, payment in lieu of tax arrangements yield inequitable results since each organization typically agrees to pay a different percentage of the tax it would owe (Hill & Kirschten, 1994). In Wilkes-Barre, Pennsylvania, for example, four nonprofit institutions, including two colleges, reached agreements with the city requiring them to remunerate 10%, 11.6%, 24%, and 134% of their assessed potential tax burdens (Leland, 1994).

Third, the payments negotiated by the taxing authorities are not based on the actual fiscal burden the city assumes in providing the college with municipal services. The negotiated contributions, instead, reflect the relative bargaining strength, power, and self-interest of both municipal and university officials. Local leaders, however, are at a distinct disadvantage when arranging payments from colleges and universities, when those payments are linked to real estate taxation. Exemption statutes permit university officials to refuse to enter payment in lieu of taxes agreements since they are not required to compensate municipalities in any manner ("Alternatives to the University Property Tax Exemption, 1973). Government officials in Ann Arbor, Michigan have been seeking annual payments of $4 million from the University of Michigan, 25% of the amount of

[8] See p. 26 for a related issue.

taxes the institution would owe if it were not immune from taxation, for some time but to no avail (Bookman, 1992; Healy, 1995a). In another example, Drake University has also refused to remunerate, to the City of Des Moine, $500,000 annually simply because the institution is tax exempt and not obligated to contribute to the city treasury (Healy, 1995a).

When institutions of higher education refuse to compensate local governments with voluntary payments, local officials, many times, try to increase their bargaining power and coerce the institutions by enforcing zoning and code regulations in university expansion projects ("Alternatives to the University Property Tax Exemption," 1973). Officials in Ithaca, New York denied building permits to Cornell University, for new construction, until it either complied with all zoning ordinances, from which the college was exempt, or reconsider the city's demand that it increase the amount of its payments in lieu of taxes from $1 million to $3 million annually. Cornell officials chose to fight the zoning decision based on the argument that the institution contributed enough to the city through "jobs, volunteers, visitors, advise, and intellectual and artistic fare" (Healy, 1995a, p. A27).[9]

In Pennsylvania, the Governor recently signed legislation which exempts state-related institutions of higher education from local zoning ordinances. The legislation was initiated as a result of Temple University's inability to obtain a zoning variance, from the City of Philadelphia, for the construction of a sports arena and community resource center. City officials first offered to grant Temple the zoning variance if the university agreed to

[9] The outcome of the appeal is unknown.

contribute $5 million to help build low and moderate income housing in the surrounding community. A dispute erupted, however, when city and university officials disagreed on who should control housing project funds. City leaders then refused to grant the variance unless university officials agreed to allow a community group to administrate the project rather than university administrators. Although state legislatures approved a bill pre-empting zoning ordinances for state-related universities, city leaders, in Philadelphia, continue to deny Temple a zoning variance, increasing the likelihood that litigation will be necessary to settle the dispute (Pulley, 1995).

Local officials in other communities increase their bargaining strength by imposing service fees, on either an annual or per use basis, when institutions of higher education refuse to make voluntary payments to city governments ("Alternatives to the University Property Tax Exemption, 1973; Blumenstyk, 1988; Rudnick, 1993). When the National College of Education tried to purchase additional facilities, the City of Chicago passed a law requiring the institution to pay $300,000 annually in service fees (Blumenstyk, 1988). Drake University, because of its refusal to compensate the City of Des Moine with payments in lieu of taxes, must now pay for fire protection services on a per use basis. In addition, to ensure that the university utilizes the city's fire protection service, local leaders are interpreting fire codes more strictly and requiring the institution to use the service for even minor fire emergencies (Healy, 1995a).

Finally, community officials improve their negotiating position by initiating legislation that authorizes them to assess payments in lieu of taxes from exempt organizations. State legislation is currently pending, in New Hampshire and Rhode Island,

to allow community leaders to levy payments, similar to the real estate tax rate, on institutions of higher education to help offset the cost of municipal services (Mercer, 1994).

As the need for additional revenue continues to grow, city leaders throughout the United States will continue to ask, coerce, or require college administrators to arbitrate payment in lieu of tax agreements. The increasing use of this strategy, to assess tax payments, is encouraging attorneys to recommend that institutional leaders, "cut the best deal as early as possible because the erratic nature of court decisions might lead to much higher payments in lieu of taxes or the actual assessed tax burden" (Leland, 1994, p. 6). Consequently, college and university leaders in all states must prepare to confront this potential challenge as well.

Implications for Higher Education

As the controversy surrounding the tax exempt status of institutions of higher education increases, challenges to the real estate tax exemption, by local officials seeking remedies to fiscal concerns, will expand as well. With colleges and universities owning real estate worth hundreds of thousands, or millions, of dollars in property tax revenue, an increase in property tax litigation utilizing any of the current property tax assessment strategies, could have harmful effects on the fiscal exigency of most collegiate institutions. Many universities would have to increase tuition, or reduce the number and/or quality of services, to secure the resources necessary to pay a property tax bill. Other colleges,

unable to obtain the needed revenues, would have no other choice but to shutdown instead (Ginsberg, 1980; Grobman, 1994; Hellerstein & Hellerstein, 1978).

Bookman (1992) indicates that, "all too often an organization loses all, or part, of its property tax exemption due to a lack of knowledge as to the permissible scope of utilization of property under state law" (p. 189). To prevent institutions of higher education from losing their property tax exempt status due to ignorance, college and university administrators must know their state's constitutional and statutory real estate tax exemption laws. They must, additionally, recognize the likelihood that local community leaders will challenge their tax exempt status, or request payments in lieu of taxes, to prepare for an increasingly uncertain future.

The role of the higher education researcher, therefore, is to provide campus officials with the information they need to prevent property tax exemption challenges, and voluntary contribution requests, from destroying the fiscal exigency of our nation's colleges and universities. Although an understanding of the nationwide trends in real estate tax assessment on colleges and universities is valuable, a more critical review and analysis is needed to comprehend the myriad of issues surrounding the tax exempt status controversy, and to enable institutions of higher education to respond to property tax exemption challenges. This review must begin with an analysis of individual state property taxation laws, and the state court's interpretation of these statutes, to determine the potential for colleges and universities, in each state, to encounter real estate tax litigation. An comprehensive examination of the local forces inciting the property tax exemption challenges in specific communities, and the judicial responses to those disputes, is also

needed to empower university leaders to respond appropriately to local real estate tax exemption challenges (Bookman, 1992). Finally, with challenges to the property tax exemption threatening to fracture the favorable relationship colleges and communities have enjoyed in the past (Leland, 1994), an analysis of state and local public policy issues, affected by the property tax exemption debate, is also necessary to enable higher education advocates and government leaders to develop policies to ensure that positive campus/community relationships continue well into the future (Rudnick, 1993).

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Appendix A

Instructional vs. Noninstructional Use of Property
Summary of Selected Cases

Use of Property	Instructional Use Exempt	Noninstructional Use Not Exempt
Residence Halls	**Worthington Dormitory, Inc. v. Commissioner of Revenue** 292 N.W.2d 276 (Minn. 1980)	**Wheaton College v. Department of Revenue** 508 N.E.2d 1136 (Ill. App. 2 Dist. 1987)
Fraternity/Sorority Residences	**Knox College v. Illinois Dept. of Revenue** 523 N.E.2d 1312 (Ill. App. 3 Dist. 1988) **Alpha Rho Zeta of Lambda Chi Alpha, Inc. v. Inhabitants of City of Waterville** 477 A.2d 1131 (Me. 1984)	**Sigma Alpha Epsilon Fraternal Ass'n v. Board of County Comm'rs** 485 P.2d 1297, 1305 (Kan. 1971)
Faculty Residences	**Order of St. Benedict v. Gordan** 417 A.2d 881 (R.I. 1980)	**Connolly v. County of Orange** 824 P.2d 663 (Cal. 1992) **Tusculum College v. State Board of Equalization** 600 S.W.2d 739 (Tenn. App. 1980)
President's Residence	**St. Ambrose University v. Board of Review for City of Davenport** 503 N.W.2d 295 (Iowa 1993) **Tusculum College v. State Board of Equalization** 600 S.W.2d 295 (Tenn. App. 1980) Partial Exemption	**Bexar Appraisal District v. Incarnate Word** 824 S.W.2d 295 (Tex. App.-San Antonio 1992)
Staff Residence	**In re Swarthmore College** (1994)	**Supervisor of Assessments of Baltimore City v. Friends School** 513 A.2d 911 (Md. App. 1986)
Recreational Facilities	**Board of Trustees of Leland Stanford Junior University v. County of Santa Clara** No. 337067 (Sup. Ct. Santa Clara Cty. 1978) Golf Course exempt - only incidental public use	**Middlebury College v. Town of Hancock** (1986) Ski Area not exempt - used by public **Depaul Univ., Inc. v. Rosewell** 531 N.W.2d 884 (Ill. Ct. App. 1988) Tennis Courts not exempt - leased to private organization
Day Care Center	**St. Ambrose University v. Board of Review of City of Davenport** 503 N.W.2d 295 (Iowa 1993)	
Parking Lots	**Bexley Village, Ltd. v. Limbach** 588 N.E.2d 246 (Ohoi App. 10 Dist. 1990)	**Park Square Garage, Inc. v. New York University** 280 N.Y.S.2d 1 (1967)

Appendix A
Continued

Use of Property	Instructional Use Exempt	Noninstructional Use Not Exempt
Dining Halls	**People ex rel. Board of Trustees of Mt. Pleasant Academy v. Mezger** 73 N.E. 1130 (N.Y. 1904)	
Bookstores	**Ohio N. Univ. v. Tax Comm'r** 255 N.E.2d (Ohio 1970)	
Vacant Lot	**Knox College v. Illinois Dept. of Revenue** 523 N.E.2d 1312 (Ill. App. 3 Dist. 1988) **Trustees of Union College v. Board of Assessment Review of City of Schenectady** 457 N.Y.S.2d 971 (N.Y.A.D. 1982)	**District of Columbia v. Trustees of Amherst College** 515 A.2d 1115 (D.C. App. 1986)
Athletic Stadiums		**Syracuse University v. City of Syracuse** 459 N.Y.S.2d 645 (N.Y. App. Div. 1983)
Buildings not in Use	**Des Moines Coalition for the Homeless v. Des Moine City Bd of Review** 493 N.W.2d 860 (Iowa 1992)	**Metropolitan Dade County v. Miami-Dade County Community College Foundation, Inc.** 545 So.2d 324 (Fla. App. 3 Dist. 1989)
Facilities Leased to forprofit Organizations	**Hoboken v. Trustees of Stevens Institute** 588 A.2d 1262 (N.J. Tax 1990) continued to be use for educational purpose	**Northern Illinois University Foundation v. Sweet** 603 N.E.2d 84 (Ill. App. 2 Dist. 1992) used for profit **Stevens v. Rosewell** 523 N.E.2d 170 (Ill. App. 1 Dist 1988)
Facilities Used for Profit	**Board of Trustees of Ohio State University v. Kinney** 449 N.E.2d 1282 (Ohio 1983) **State for Use of University of Cincinnati v. Limbach** 553 N.E.2d 1056 (Ohio 1990)	**J.A.T.T. Title Holding Corp. v. Roberts** 375 S.E.2d 512 (Ga. 1988)

Appendix B

In re Appeal of the City of Washington
Summary of Lower and Appellate Court Decisions

Charitable Purpose Test Criteria	Pennslyvania Court of Common Pleas Denied Property Tax Exempt Status	Pennsylvania Commonwealth Court Reinstated Tax Exempt Status
Advances a charitable purpose	Washington and Jefferson does not provide need based scholarships (merit aid only), has sources of contributions (alumni) which other types of entities do not have; engages in otuside activities "supposedly" related to educational purpose; and receives income/revenue from a variety of sources including unrelated business income. W & J's argument that since revenue from tuition and fees covers only 75% of expenditures qualifies as a public charity not valid since "providing education is not itself a charitable function."	Washington and Jefferson College is a charitable organization when "evaluated under the constitutional requiremetn of a purely public charity as a college, university, seminary, or academy," and that its services do benefit the general public since enrolllment is open to all who meet the academic requirements.
Donates or gratuitously renders a substanital portion of its services	The college does not provide services to those who cannot pay, does not make up deficits of students admitted and enrolled who could not pay, and financial aid is merit based, not need based. Indicated that "higher education is a privilege, not a public responsibility."	The college does donate or render gratuitously a substantial portion of its services by subsidizing a majority of students through need based grants and merit scholarships, subsidizing every student through use of its endowment, and offers its facilities to the community free of charge or for a nominal fee.
Benefits a substantial and indefinite class of persons who are the legitimate subjects of charity	The institution does not provide services to those who cannot pay and no effort is made to enroll needy students. "If one cannot borrow or pay the costs of educatoin, he or she must forego higher education at Washington and Jefferson." Although indirect benefits do come from any institution of higher education, HUP make it invalid for obtaining property tax exemption. Services must directly benefit the object of charity.	Washington and Jefferson College does benefit a substantial and indefinite class of persons who are legitimate subjects of charity because it is open to the indefinite public under reasonable restrictions. The fact that students who are unable to pay may not attend does not destroy the institution's public character.

Appendix B
Continued

Charitable Purpose Test Criteria	Pennslyvania Court of Common Pleas Denied Property Tax Exempt Status	Pennsylvania Commonwealth Court Reinstated Tax Exempt Status
Relieves the government of some of its burden	Washington and Jeffereson does not relieve the government of some of its burden because neither the federal or state government has any burden to educate its citizens beyond high school. Fact that the college receives some money from the state government merely means that the legislation and the Governor have determined that some of the state funds should be allocated to higher education. The argument that this practice somehow relieves the state of some of its burden has no merit. Providing education is substantially different from government ofligations to care for the sick, handicap, indigent, and homeless.	The institution relieves the government of some of its burden because the state of Pennsylvania would have to expand its own system of higher education if the college was not available or did not provide its services at a reasonable cost.
Operates entirely free form private profit motive	Salaries and benefits to officials do not indicate a private profit motive.	Salaries and benefits to officials do not indicate a private profit motive.